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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY

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[Defendants cont'd from front cover]

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Defendants.

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BRIEF OF PETITIONER IN REPLY

In this Reply, Star Market Company ("Star Market") challenges the United States' claims that it somehow waived its subject matter jurisdiction claim or its claim of denial of its most basic due process rights. Star Market challenges as well the purported "right" of a court-appointed *Teamster* to reverse an impartial arbitration award to "enforce" *internal* Teamster remedies.

There is NO mootness in this case. The very real injury which Star Market suffered continues to this very day – forced to employ an employee, whose discharge was unequivocally upheld in a final and binding, impartial arbitration.

I. STAR MARKET HAS PRESERVED ITS RIGHTS TO CHALLENGE THE JURISDICTION AND AUTHORITY OF THE COURT-APPOINTED TEAMSTERS *AND* THE DISTRICT COURT TO OVERTURN THE RESULTS OF AN IMPARTIAL ARBITRATION AWARD.

A. THERE HAS BEEN NO WAIVER OF STAR MARKET'S CHALLENGE TO SUBJECT MATTER JURISDICTION.

The United States argues that the there has been a waiver by Star Market of subject matter defenses. In the brief to the Court of Appeals, Star Market specifically preserved its subject matter jurisdiction claims originally raised in the District Court (C.A. p. 12, n.6). This was done despite the fact that the Second Circuit had recently rejected these claims in a divided panel decision in *United States v. IBT (Yellow Freight),* 948 F.2d 98 (2d 1991). In response, the Court of Appeals specifically addressed Star Market's challenge to subject matter jurisdiction in its Opinion (A-18). Moreover, subject matter jurisdiction of a court may be challenged at any time. *See* Fed.R.Civ.P. 12(h)(3). Indeed, when in doubt, this Court, *sua sponte*, will inquire into its jurisdiction over subject matter. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, *reh'g denied*, 476 U.S. 1132 (1986); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939). Thus, the issue of whether the District Court properly asserted jurisdiction over this dispute is squarely before the Court.

It was once settled that the NLRB has exclusive jurisdiction to hear and decide disputes which *even arguably* impact rights guaranteed by sections 7 and 8 of

the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Claims of anti-union animus, as alleged by Henderson and found by the Election Officer, fall squarely within the Board's exclusive jurisdiction. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). Therefore, the courts below improperly asserted subject matter jurisdiction over this dispute.

B. STAR MARKET DID NOT VOLUNTARILY SUBMIT ITSELF TO THE JURISDICTION OF THE COURT-APPOINTED TEAMSTERS OR THE DISTRICT COURT.

The United States also claims that Star Market "submitted to the Election Rule remedial scheme", thus waiving its rights to protest (Opp. 10). Star Market never "submitted" to the alleged authority of the court-appointed officers or the District Court in this case. Once the Teamster Election Officer attempted to assert his authority over Star Market alone, as opposed to the issue of Teamster involvement in the joint Committee, discussed below, Star Market resisted the attempts of the court-appointed Teamsters and the District Court to exercise power over its collectively bargained rights.

II. STAR MARKET WAS NEVER NOTIFIED THAT IT ALONE WAS THE SUBJECT OF A TEAMSTER ELECTION PROTEST.

The United States argues that Star Market received full due process, including adequate notice of the proceedings against it. This entire argument *presumes*, as did the Second Circuit in error, that Star Market was served notice of an election protest that accused it of an election rule violation *by discharging Henderson*. This presumption is absolutely necessary for the United States. Otherwise, there existed no charge to which Star Market *could have responded* "to present information to the Election Officer" (Opp. 9). The actual *record* is clear and undisputed, however, that Star Market was never

notified that it had been accused of election rule violations in its *discharge* of Henderson until the hearing before the district court (A190-91). No *record* fact contradicts this *record* assertion, nor is there even an attempt by the United States or the courts below to address it. The opinion of the Court of Appeals simply failed to distinguish between the *two separate* election protests and assumed that both were the same. A review of the two protests (A61, A62) demonstrates how serious a due process error this is.

Only the second protest (A62) would give Star Market, or any reasonable employer, any reason to believe that *it* had become the target of the Teamster Election Officer's investigation into the *substance* of the discharge. This is the lack of notice — to which Star has consistently objected (A212). Thereafter, petitioner declined to comply with the orders of the court-appointed Teamsters, forcing them to act, hopefully in accordance with settled legal principles. The United States described what happened next simply as:

> ". . . the government filed a motion asking the court to affirm the Independent Administrator's decision and to direct petitioner to comply". (Opp. 6).

Conveniently, no mention is made of the threats of contempt, both civil and criminal, and the large daily fines threatened *by the United States* in this enforcement effort purportedly by "private parties" (A147, A220). Petitioner specially appeared before the District Court to challenge that Court's authority, first to reach it at all, then to overturn the results of an impartial arbitration award (A172). The United States would equate Star Market's special appearance, under threat of contempt, into an acquiescence to the District Court's jurisdiction.

An assertion is made that this waiver argument is supported by *Langenkamp v. Culp*, __ U.S. __, 111 S.Ct. 330, 112 L. Ed. 2d 343 (1990), *reh'g denied*, __ U.S. __, 111 S.Ct. 721, 112 L. Ed. 2d 709 (1991) and *Katchen v.*

Landy, 382 U.S. 323 (1966). However, both *Langenkamp* and *Katchen* involved creditors who *voluntarily* submitted their claims against a bankrupt estate and then sought to escape the bankruptcy court's equitable jurisdiction when sued by the trustee. Had Star Market simply appealed the Independent Administrator's decision to the District Court, those cases might be relevant. They are not, however, here. Star Market was "ordered" to appear before the District Court and did so under penalty of contempt (A171). Star Market never voluntarily submitted to any of the proceedings below and has waived none of its rights.

III. STAR MARKET WAS ADJUDGED BY A PARTIAL AND ADVERSE COURT-APPOINTED, QUASI-JUDICIAL TEAMSTER.

In its due process argument, the United States omits any response to the lack of *impartiality* by the Teamster Election Officer as a decision maker in the Consent Decree's quasi-judicial scheme. It did so for obvious reasons. The Election Officer was a court-appointed *Teamster* with broad power *over Teamsters and obliged to protect the rights of Teamsters*. He was not appointed to protect the rights of employers. Thus, by definition, the court-appointed Teamster officers were not impartial. They were sworn to favor and vindicate the interests of Teamsters.

If it were to be judged at all, Star Market had a right to an impartial judge. It was faced instead by a "judge" who was sworn to defend the rights of Star Market's accuser. While the United States argues that all due process requirements were met, including apparently the right to an impartial decision maker, the very essence of partiality which taints this case warrants a repudiation by this Court of the proceedings below.

IV. THE ASSERTION OF ALLEGED INDEPENDENT RIGHTS IS A PRETEXT TO AVOID THE RESULTS OF ARBITRATION.

The United States relies upon a series of opinions by this Court[1] to suggest that "a court is not required to defer either to an arbitrator or the NLRB where an employee asserts rights legally independent of the collective bargaining agreement or the National Labor Relations Act" (Opp. 10). This argument fails to acknowledge that all cited cases deal with separate legislative remedies that provide alternative forums. The United States' position in this case serves only to undermine arbitration as a source of labor peace and would help to foster the piecemeal creation of *ad hoc* litigation-based rights, the only result of which is to circumvent arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, __ U.S. __, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

In *Gilmer*, this Court considered the alleged inadequacies of arbitration and rejected its prior reservations to permit arbitration *finally* to resolve federal statutory claims. While the *Gilmer* case distinguishes its holding as not reaching that of *Alexander*, the present matter gives the Court a clear opportunity to extend its endorsement of arbitration as the principle mechanism for dispute resolution.

The United States argued, and the Second Circuit apparently accepted, that the District Court's Election Rules serve as a source of law to create an independent cause of action which somehow need not be arbitrated – this even though the entire incident arose out of a collectively bargained work relationship. This argument should be rejected for several reasons. Labor arbitration has long been viewed by this Court as a fundamental source of labor peace. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). In relying on

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1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Alexander in the circumstances of this case, the United States would expand the "independent rights" doctrine beyond recognition and thereby gut labor arbitration's efficacy. Given a ready avenue to avoid arbitration where other litigation of almost any nature is ongoing, there would be no limit to the danger for piecemeal, *ad hoc* adjudication of "rights", each designed to cut through the red tape of due process and achieve a current, social goal. Like hearsay, the exceptions can be predicted to overwhelm the rule.

Even if rights *against employers* were created by the Election Rules, where the dispute involves parties to a collective bargaining agreement, there is no reason for that dispute to be resolved outside of the bargained-for arbitration process. The United States' assertion of this new source of Teamster "rights" endorses the notion that only it or its hand-picked annointees are capable of discerning what those "rights" ensure and what other, more commonly recognized rights are preempted. Here, impartiality is lost and a forum is created where only the government, and its latest social agenda, can win.

The United States Attorney and the District Court seek to achieve social ends, admittedly laudable, cast as new or implied "rights", beyond any otherwise imaginable. For example, how could it be suggested that, without legislative support, even the Attorney General or any federal court could simply step in and force *all employers* to submit to quasi-judicial proceedings, *judged by an union official, court-appointed or elected, and enforced by the federal courts' contempt power, solely seeking to enforce union member's rights.* It is almost absurd to suggest it in any context even during the state of war.

No law, regulation, rule or Opinion of this Court has ever authorized the government to do anything like this. These new "rights" have become a guise to avoid due process for a laudable end. This unwarranted expansionism by the government to create new "rights" to enforce social ends has been recently rejected by the Court in

Presley v. Etowah County Commissioners et al., __ U.S. __, 112 S.Ct. 820, 117 L. Ed. 2d 51 (1992), and should be rejected by the Court in this case as well.

V. THE CONTINUING INJURY TO STAR MARKET PRECLUDES MOOTNESS.

It is also remarkable that the first argument of the Teamster Election Officer is that the Teamster election is now "over". Star Market had argued that the Teamster Election Officer acted with an "end justifies the means" philosophy. Nothing demonstrates this proposition more than the Election Officer's own argument. Are clear denials of due process and the unjustified erosion of the well-established arbitration process in this case unworthy of this Court's consideration because a court-appointed Teamster assures this Court that further abuses are unlikely to reoccur?

Bluntly put and recast simply that argument is: if the Teamster Election Officer made a mistake, it was in all in a good cause, *no Teamster was hurt by it* and thus is not worth this Court's time.

Due process and its preservation has been, is and always will be worth this Court's closest attention, as this Court has so often demonstrated. To accept the Teamster Election Officer's invitation to let the matter drop as a bygone event is to accept that the denial of due process as an issue of quantity and frequency, not quality, and that an admirable result excuses indefensible means.

CONCLUSION

Star Market respectfully asks the Court to vindicate the value of impartial labor arbitration and accord to it the same recognition which the Court has recently extended to arbitration under other circumstances. Further, the Court should reaffirm the long defined mandates of due process and specifically extend them to the Consent Decree setting so as to preclude future abuse by the handpicked annointees of the government.

Respectfully submitted,

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